Supreme Court, U.S.
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No. 01-40

In The

Supreme Court of the United States

DANIEL MORRIS COLWELL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONSE IN OPPOSITION ON BEHALF OF RESPONDENT

SUSAN V. BOLEYN
Senior Assistant Attorney General
Counsel of Record for Respondent

THURBERT E. BAKER
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

Please serve:

SUSAN V. BOLEYN
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3397

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

I. WHETHER THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A STATE COURT DECISION RESTING ON A QUESTION OF FACT RESOLVED ADVERSELY TO THE PETITIONER CONCERNING WHETHER PETITIONER PROCEEDED WITH HYBRID REPRESENTATION DURING HIS SENTENCING TRIAL?

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PART ONE

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury of Sumter County, Georgia, on December 2, 1996, on two counts of malice murder, six counts of felony murder, two counts of aggravated assault, one count of possession of a firearm by a convicted felon, one count of possession of a pistol at a public gathering, and one count of carrying a pistol without a license. The State filed a notice of intent to seek the death penalty against Petitioner on February 14, 1997. Following a competency hearing, Petitioner was found competent to stand trial on April 23, 1998. Immediately thereafter, Petitioner entered guilty pleas as to all of the offenses with which he was charged.

During pre-trial hearings, Petitioner conferred with his attorneys and stated on the record that he was satisfied with trial counsels' representation. (Pre-trial hearing of 2/14/97, p. 14; Pre-trial hearing 11/20/97, p. 30; Pre-trial hearing 4/10/98, p. 55; Guilty Plea Hearing 4/23/98, pp. 3, 4, 28, 30). However, in a letter dated August 18, 1997, Petitioner, while not asking to proceed pro se, did ask the trial court whether he could represent himself during trial, as he believed a defense lawyer could not help him. (Trial transcript, p. 2026). In a letter dated November 3, 1997 to his counsel, Petitioner still did not ask to proceed pro se, but asked his attorney to withdraw based on his feeling that his attorneys were not representing Petitioner's wishes. (Competency Trial transcript, pp. 1203-1204).

During the pre-trial hearing conducted on September 1, 1998, Petitioner's trial counsel argued, against Petitioner's wishes, that Petitioner should be allowed to withdraw his guilty pleas, (Pre-trial hearing 9/1/98, p. 21), because trial counsel asserted that Petitioner was not in control of his own case (Pre-trial hearing 9/1/98, pp. 18-20, 35-36, 37), that Petitioner was incompetent to make decisions about his trial and that defense counsel should be allowed to proceed in the manner thought best by defense counsel without concern for their client's wishes. (Pre-trial hearing 9/1/98, pp. 18-20, 21, 35-36.) It was only at this point that Petitioner informed the court that he would like to represent himself. (Pre-trial hearing 9/1/98, p. 40). The trial court informed Petitioner of the following:

> Well, I tend to think you do have the right. I think you obviously have some excellent lawyers. You might want to certainly utilize them in assisting with your trial. They will certainly be available, unless they want to withdraw, or unless they are withdrawing from the case. They'll be here to assist you in trial, and they can assist you in trial. I anticipate they will assist you in trial, but the jury has found you competent and you're in control of your case. You make the decisions as to what you want to do in your trial and what you want to do in your case. Now your attorneys are here to advise you because they're experts in this area and they're here to assist you at the presentation of your case, and I think that's where we are.

(Pre-trial hearing 9/1/98, p. 41).

It is significant that during the same pre-trial hearing, Petitioner once again reiterated that he was satisfied with the representation of his attorneys. (Pre-trial hearing 9/1/98, p. 53).

In a letter addressed to the trial court dated September 5, 1998, Petitioner again stated that he wished to proceed pro se if his attorneys would not agree with how his case was to be handled. (Trial transcript, pp. 2044-2045). Then, at the pre-trial hearing conducted on September 17, 1998, defense counsel asserted that Petitioner allegedly wanted to represent himself. (Pre-trial hearing of 9/17/98, p. 93). The trial court stated that he had received Petitioner's September 5, 1998 letter and the trial court reaffirmed that Petitioner was in control of his case, by stating:

> Mr. Colwell's been found to be competent and he's in control of his case, and you're his lawyers, and y'all will certainly use your best efforts to represent him, but he is in control of his case and has ultimate decision on most aspects of how the case will be done.
>
> I don't want Mr. Colwell to represent himself, although he may be capable of doing so. I would want you to continue, and I anticipate that y'all will continue as his counsel representing Mr. Colwell, so I don't want you to withdraw. However, I anticipate that Mr. Colwell will maintain his competency and will be capable of making an informed decision based upon the advice of counsel as to his rights and how he should proceed in this matter, but it is his decision.

> . . . the attorneys should control the case, should control cross-examination, should control jury selection, but if a competent juror – or if a competent party says, 'I don't want juror ten,' I think – if he is competent, I think the attorney is required to follow the instructions of the client.

(Pre-trial hearing 9/17/98, pp. 99-100).

The fact that Petitioner was not unequivocally invoking his right to self-representation is shown by the fact that later in the hearing of September 17, 1998, Petitioner informed the trial court that he would fire counsel if defense counsel attempted to introduce mitigating evidence. (Pre-trial hearing 9/17/98, p. 116). The trial court reiterated throughout this hearing that Petitioner was in control of the case. (Pre-trial hearing 9/17/98, p. 122, 123, 124, 125).

On September 30, 1998, prior to the beginning of the voir dire of the sentencing jury, defense counsel informed the trial court that Petitioner wished for defense counsel to remain in the case and represent Petitioner. (Trial transcript, pp. 2-3). The trial court confirmed on the record that Petitioner wanted representation by counsel. (Trial transcript, pp. 3-11). When the trial court stressed to Petitioner that he retained ultimate control of his case (Trial transcript, pp. 22, 23-24), Petitioner explicitly stated, "I understand. I understand that you have given me full control *and I understand that I've decided to let my lawyers to take control.*" (Trial transcript, pp. 23-24). (emphasis added).

During voir dire of the sentencing jury on October 5, 1998, the issue of Petitioner's representation was again

addressed by the trial court and after conferring with defense counsel, Petitioner chose to proceed to the sentencing trial with the assistance of defense counsel. (Trial transcript, pp. 3, 14). Petitioner informed the trial court of his reasoning for allowing representation by trial counsel at sentencing by stating, "I kind of do want, you know, them to put a fight so the Supreme Court won't say, Well there was not argument for Colwell not getting the death penalty." (Trial transcript, pp. 18, 25). Petitioner chose to continue to confer and rely on his attorneys. (Trial transcript, p. 21). In fact, defense counsel for Petitioner stated that Mr. Colwell and defense counsel were in agreement on how to proceed with Petitioner's case and that Petitioner was aware he could fire defense counsel at any time. (Trial transcript, p. 9).

Throughout the proceedings on October 5, 1998 and October 6, 1998, the trial court repeatedly informed Petitioner and defense counsel that Petitioner had the ultimate control over his case. (Trial transcript pp. 15, 21, 23-26, 29, 31-33, 35, 1605-1608, 1613, 1620-1622, 1622-1623). The record establishes that throughout his sentencing trial, Petitioner conferred with defense counsel. (Trial transcript, pp. 1795, 1801, 1816-1817, 2065-2066, 2228). At the conclusion of his sentencing trial, Petitioner stated that he "had no problems" with his attorneys' representation and was satisfied with that representation. (Trial transcript, pp. 2186, 2309, 2321).

On October 13, 1998, following the conducting of the sentencing trial, the jury found the existence of the following statutory aggravating circumstances: (1) the murder of Mitchell Bell was committed while the defendant was engaged in the commission of the murder of Judith

Bell; (2) the murder of Mitchell Bell was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind and aggravated battery; (3) the murder of Judith Bell was committed while the defendant was engaged in the commission of the murder of Mitchell Bell; (4) the murder of Judith Bell was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind and aggravated battery; and (5) the murder of Judith Bell was outrageously and wantonly vile, horrible and inhuman in that it involved torture. The jury recommended a sentence of death.

Petitioner filed a motion for new trial on November 12, 1998, and filed an amendment to that motion on July 7, 1999. Petitioner's motion for a new trial, as amended, was denied on November 1, 1999.

The Supreme Court of Georgia affirmed Petitioner's two convictions for malice murder and resulting death sentences in *Colwell v. State*, 273 Ga. 634, 544 S.E.2d 120 (2001). On direct appeal, appellate counsel for Petitioner alleged that the trial court should have allowed Petitioner to represent himself, that the trial court should have conducted a hearing on Petitioner's competence to allegedly waive his right to counsel and that the trial court "forced" Petitioner to proceed with a "mixed form of representation." *Colwell v. State*, 273 Ga. 634(3), 544 S.E.2d 120 (2001). However, the Georgia Supreme Court found as a matter of fact that Petitioner was not forced to proceed with a form of hybrid representation in which Petitioner acted as co-counsel. *Id.* Petitioner now seeks review of this portion of the decision of the Georgia Supreme Court, arguing that this Court should exercise certiorari jurisdiction to determine whether a *Faretta*

hearing should be conducted before proceeding with hybrid representation, despite the clear factual finding by the Supreme Court of Georgia that no hybrid representation had in fact been implemented by the trial court.

PART TWO

STATEMENT OF THE FACTS

In its decision on direct appeal, the Georgia Supreme Court summarized the facts supporting Petitioner's malice murder convictions and death sentences as follows:

> The evidence presented at Colwell's sentencing trial showed that Colwell, wishing to die but unable to commit suicide, formulated a plan to kill more than one person in order to secure his own execution. He put his plan in motion on July 20, 1996, when he drove to a store parking lot in Sumter County and approached Mitchell and Judith Bell as they conversed with a friend. Colwell shot Mr. Bell in the back, stood over him as he begged for his life, and shot him in the head. Colwell then shot Mrs. Bell in the head as she lay on the pavement wailing. Colwell left the Bells, got into his car, and drove to the Americus Police Department where he gave a tape-recorded confession. In the tape-recorded statement, which was played for the sentencing jury, Colwell explained that he had purchased a handgun to commit suicide but "didn't have the nerve to pull the trigger to [his] head." He went on to say that he wanted to commit suicide and saw "going to the electric chair" as "a way of dying." After Colwell's counsel presented extensive evidence in mitigation, Colwell testified

> and told the jury he had committed the murders for the purpose of obtaining a death sentence and that he would kill again if he did not receive the death penalty.

Colwell v. State, 273 Ga. 634, 635, 544 S.E.2d 120 (2001).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A STATE COURT DECISION RESTING ON A QUESTION OF FACT RESOLVED ADVERSELY TO THE PETITIONER CONCERNING WHETHER PETITIONER PROCEEDED WITH "HYBRID REPRESENTATION" DURING HIS SENTENCING TRIAL.

Petitioner alleges that this case presents this Court with the proper vehicle for determining whether a waiver of the right to counsel is required whenever a defendant "proceeds with hybrid counsel." (Petition, p. 8). However, the decision of the Georgia Supreme Court which is the subject of this petition for a writ of certiorari rejected Petitioner's assertion that the trial court permitted Petitioner to proceed with hybrid representation during his sentencing trial. Respondent submits that this Court should not exercise its certiorari jurisdiction to review an issue resting on a disputed question of fact decided adversely to Petitioner by the Georgia Supreme Court. *See United States v. Johnson*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938) (granting of the writ would not be warranted to review the evidence or inferences drawn from it.)

The Georgia Supreme Court extensively reviewed the various representations made by trial counsel, the numerous discussions between the trial court and Petitioner and Petitioner's actions and statements throughout the pre-trial and sentencing proceedings in reaching its ultimate conclusion that Petitioner was merely an active client, not co-counsel, at his sentencing trial. The Georgia Supreme Court found as follows in rejecting Petitioner's contentions that he proceeded with hybrid representation:

> Counsel argues on appeal that the trial court violated Colwell's rights under the constitutions of Georgia and the United States by refusing Colwell's request to conduct his case pro se. Having been found competent to stand trial, Colwell was entitled to represent himself at trial upon a request to do so and upon a finding that his decision was knowing and intelligent. Id.; Ga. Const. 1983, Art. I, Sec. I, Par. XII; see *Godinez v. Moran*, 509 U.S. 389 (113 S.Ct. 2680, 125 LE2d 321) (1993) (holding that the standards governing competence to stand trial, to plead guilty, and to waive the right to counsel are the same, although the issues of competence and the knowing and voluntary nature of a decision are not the same). However, after the trial court explained to Colwell that he would be in control of his case and after he learned that any death sentence was more likely to be affirmed on appeal if a mitigation case were presented, Colwell gave his approval to counsel's representation. Colwell, it appears from the record, did not wish to represent himself but, rather, wished to have counsel represent his interests as he perceived them. See *Potts v. State*, 259 Ga. 96,

105(28) (376 SE2d 851) (1989) (finding that the defendant "withdrew his request after the trial court gave him time to reconsider and reflect on the consequences of self-representation"); see also *Thaxton v. State*, 260 Ga. 141, 142(2) (390 SE2d 841) (1990) (holding that a request to conduct one's trial pro se must be "unequivocal"). Through the long and sometimes heated discussions between the trial court, Colwell, and counsel, Colwell's representation was finally arranged to Colwell's satisfaction. This arrangement properly respected Colwell's right to make the "ultimate decision about" what sort of case to present. *Morrison v. State*, 258 Ga. 683, 685-86(3) (373 SE2d 506) (1988); see also *Reid v. State*, 235 Ga. 378, 379-80(1) (219 SE2d 740) (1975) (noting with approval the ethical standard that even those matters generally within the control of counsel should be decided "after consultation with the client"). We conclude that the trial court did not force unwanted representation upon Colwell.

Counsel's assertion that the trial court should have conducted a further hearing on Colwell's competence and on the knowing and voluntary nature of his decision about his representation is without merit. Colwell had just been found competent after a lengthy competency trial, and the trial court carefully explained Colwell's rights to him and made repeated and thorough inquires of him concerning his decisions about his representation and whether those decisions were freely made. As we held in *Wayne v. State*, where the defendant *did* wish to waive his right to counsel, "The record need only reflect that the accused was made aware of the dangers of self-representation and nevertheless made a

knowing and intelligent waiver." *Wayne v. State*, 269 Ga. 36(2) (495 SE2d 34) (1998) (applying *Faretta*, supra, 422 U.S. 806). Here, the trial court accepted the jury's finding of competence, informed Colwell of his rights, and accepted Colwell's decision to allow counsel to present a mitigation case and to present his own point of view in other ways. Although we note that such an inquiry is not generally required where a defendant elects to face trial *with* the representation of counsel, the trial court's inquiry in this case, which was prompted by Colwell's expressed concerns to the trial court, was sufficient to ensure the knowing and voluntary nature of Colwell's final decision on the nature of his representation.

Counsel argues that a hybrid form of representation was forced upon Colwell, with counsel serving effectively as co-counsel. See *Potts v. State*, 259 Ga. 812, 816 (388 SE2d 678) (1990) (holding that a trial court may not force co-counsel upon a defendant who wishes to represent himself or herself). *This claim is without merit. Although Colwell testified at trial, wrote several letters that were presented to the jury, and directed some of the actions of his counsel, he was acting merely as an involved client who wished to have his own views made known to the jury. By ensuring that counsel respected Colwell's wishes, the trial court did not transform counsel into co-counsel, rather, it ensured that counsel served as Colwell's counsel.* Furthermore, although we do not find that Colwell served as co-counsel, we note that, "although a defendant may not insist on acting as co-counsel, the trial court may . . . allow him or her to do so" once he or she has been advised of his or her right to counsel and of the dangers

> inherent in proceeding as one's own co-counsel. *Hance v. Kemp*, 258 Ga. 649, 650(1) (373 SE2d 184) (1988).

Colwell v. State, 273 Ga. 634, 638-639, 544 S.E.2d 120 (2001) (emphasis supplied).

Because the Georgia Supreme Court found that Petitioner had failed to establish that he proceeded with "hybrid representation" at his sentencing trial, this case does not present the appropriate vehicle for any consideration by this Court of the question of whether a valid waiver must be obtained when a defendant proceeds with hybrid representation. Further, Petitioner's mere disagreement with the Georgia Supreme Court as to whether there was any "hybrid representation" of Petitioner during his sentencing trial, does not warrant this Court's exercise of its certiorari jurisdiction. *See Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974) (certiorari review is discretionary and "depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny the instant petition for a writ of certiorari as Petitioner is merely seeking review of an issue resolved adversely to Petitioner by the Georgia Supreme Court, resting on a disputed issue of fact.

Respectfully submitted,

THURBERT BAKER 033887
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

SUSAN V. BOLEYN 065850
Senior Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3397